No. 283

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IN THE

Supreme Court of the United States

October Term, 1952 No.

MORRIS GORDON,

Petitioner,

vs.

MIRIAM GORDON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Morris Gordon, the petitioner herein, prays that a writ of certorari be issued to review the final decree of the Supreme Court of the State of Florida affirming the decree of the Circuit Court of Dade County, Florida, granting a divorce to the respondent herein.

SUMMARY STATEMENT OF THE FACTS

This petition relates to a writ of certiorari to review the decree of the Supreme Court of Florida filed on May 2, 1952.

This case had previously been considered by the Supreme Court of Florida. There is no substantial dispute as to the facts, but only as to the conclusions of law resulting therefrom. The case involves the question as to whether or not the Florida Courts accorded to a final judgment of a Pennsylvania Court the full faith and credit guaranteed that Pennsylvania judgment by the Constitution of the United States.

An important reason for the grant of a writ of certiorari to review a case decided by a State Court is a lack of uniformity in State Courts regarding the full faith and credit to be accorded the final decree of a State Court by the Courts of sister states. That there is a lack of uniformity in state courts regarding the questions presented in this case is clearly shown by that portion of the opinion of the Supreme Court of Florida, quoted at page 19 of this petition, under the reasons for granting a writ in this case.

The following facts (except those in parenthesis) are shown in the opinion on the first appeal in this case as reported in 4 A.L.R. 2d at page 104. Respondent instituted an action for divorce in Pennsylvania on the ground of indignities to her person. Petitioner appeared and filed an answer. While the case was pending, the respondent went to Florida and there instituted a suit for divorce, charging petitioner with extreme cruelty and desertion. A special master was appointed in the Florida case and testimony was taken. Subsequently, respondent moved in the Pennsylvania suit for leave to discontinue that case. The Pennsylvania Court refused to permit her to discontinue it. Upon the petitioner's motion, the Pennsylvania Court appointed a Master who proceeded to take testimony. At the hearing in Pennsylvania, the respondent did not appear nor was she represented by Counsel, although she had notice of the hearing and had ample opportunity to attend and offer testimony. After taking testimony the Master in the Pennsylvania case recommended that respondent's

Pennsylvania action be dismissed because the charges were unproved. The petitioner offered voluminous testimony. (Among other things, the master in the Pennsylvania case found that the respondent was not domiciled in Florida, but that she was a resident of Pennsylvania at the time of the hearing, which was many months after she had filed her action in Florida. (R 222-218). The parties were residents of Pennsylvania at the time of the marriage; they were married in Pennsylvania; and they lived in Pennsylvania until the respondent refused to live with her husband and separated from him. (R 134). The respondent claimed in the Florida action that she left her husband because of his treatment of her.) The petitioner offered evidence and testified regarding his conduct, in the Pennsylvania Court hearing, and the Pennsylvania Court held by final judgment that the conduct of the petitioner did not warrant a decree on the ground of indignities to the person.

The petitioner had filed an answer in the Florida case and that case came to hearing about the same time as the Pennsylvania case. The special master recommended a divorce on the ground of extreme cruelty, but held that the testimony failed to prove desertion. After the Pennsylvania action had been dismissed by the final judgment of the Pennsylvania Court, the petitioner moved to dismiss the Florida suit claiming that the dismissal of the Pennsylvania action operated as res judicata and was therefore entitled to full faith and credit in the Florida court. He was permitted to amend his answer to set up the Pennsylvania judgment as a bar to the respondent's action in the Florida Court. Subsequently, the Circuit Court in Florida denied the petitioner's motion to dismiss the respondent's suit there, and struck from the answer the amedment which included the record of the Pennsylvania case and judgment. The circuit Court for Dade County, Florida, then granted the respondent an absolute divorce.

From that decree, the petitioner appealed to the Supreme Court of Florida and that court reversed the cause and remanded the case for further proceedings.

We believe that the questions involved can be presented most clearly by adopting the following statements from the opinion of the Supreme Court of Florida now under review and by stating certain undisputed facts which appear in the transcript of the record on the second appeal to the Supreme Court of Florida. With this purpose in view, we quote from the opinion (R 770): "This is the second appearance of the instant suit in this Court. The citation of our opinion on the prior appeal is 160 Fla. 838, 36 So. 2d 774, 4 A.L.R. 2d 102. On the former appeal we reversed the decree of divorce which was entered in favor of Miriam Gordon." * * * * *

The Court continues (R 772): "It was our opinion and judgment upon the first appearance of the instant suit in this Court that the Pennsylvania Court's final decree should have been given full faith and credit because we determined that both suits were predicated upon the same cause of action after concluding that the testimony which was presented by the appellee in her Florida suit was "essentially the same as that which she would have been required to present to establish her charge of 'indignities to the person', had she pursued her action in Pennsylvania where she was given ample notice and opportunity to be heard.

Upon remand to the Circuit Court appellee amended her bill of complaint. In and by her amendment she reiterated her charge of extreme cruelty and elaborated thereon. She also reasserted that the appellant had been guilty of desertion which she contends was constructive in character.

The final decree from which this appeal is prosecuted granted unto Miriam Gordon a decree of divorce a vinculo matrimonii. In and by said decree it was determined Miriam Gordon had established that her husband was guilty

of desertion and of extreme cruelty which was expressly declared to have been of a physical nature.

It was the Chancellor's view that full faith and credit need not now be given to the final decree of the Pennsylvania court. It was his opinion that the evidence which was produced by the appellee established extreme cruelty of a physical nature and that her action in Pennsylvania was not based upon a ground which contemplated physical cruelty. He further reached the conclusion that appellee's suit in this State was not foreclosed by the final decree of the Pennsylvania court because appellee did not in that court assert desertion as a ground for divorce. Moreover the Chancellor followed the suggestion of counsel to the effect that she could not have charged desertion at the time she filed her action in Pennsylvania under the law of that State because the Pennsylvania statute required desertion for a period of two years and such period had not then run." • • •

The Court then considered the testimony in the case and first disposed of the question involved in the grant of a divorce to the wife on the ground of extreme cruelty, making the following statement (R 780): "It may be that appellee's evidence made a prima facie case for a final decree of divorce upon the ground of extreme cruelty but the character of such cruelty must be classified as mental. However, it is improper for us to decide whether such evidence could be said to establish extreme cruelty of a mental character sufficient to justify a final decree of divorce because we are compelled again to hold that full faith and credit should have been given to the final decree of the Pennsylvania court, insofar as the cause of action in the instant suit was founded upon extreme cruelty, and that court decided said question adverse to appellee. The relief sought by appellee upon the ground ofextreme cruelty should have been denied because the allegations of the amended bill and the proof in support thereof failed to establish extreme

cruelty of a physical nature, and extreme cruelty of a mental character was foreclosed by the final decree in the Pennsylvania suit." • • • • •

The Court then considered the effect of the final judgment in the Pennsylvania case and the credit to be given to that final judgment in the Florida Courts insofar as the granting of a divorce on the ground of desertion is concerned. As to that cause for divorce, the Supreme Court of Florida held that the final decree of divorce granted respondent upon the ground of desertion should be affirmed (R 787). The respondent did not contend that petitioner had left her, but on the contrary that petitioneer's course of conduct caused her life with him to be so burdensome as to require her, in the interest of her health and peace of mind, to leave the petitioner. This constitutes what is commonly called "constructive desertion" (R 781).

The petitioner contended that his conduct toward his wife had been conclusively adjudicated by the final decree of the Pennsylvania Court and that the final judgment was res judicata with respect to the petitioner's conduct toward his wife. He contended that the full faith and credit clause of the Federal Constitution demanded that the Florida Courts give full faith and credit to that final decree of the Pennsylvania Court, which thus became a bar to the respondent's claim that the conduct of her husband was such as to justify her in leaving her husband. That action commenced the constructive desertion upon which the divorce decree was affirmed by the Supreme Court of Florida. That Court held that none of the issues presented in this case, insofar as it is predictated upon "constructive" desertion is concerned, was adjudicated in the Pennsylvania action, nor were the issues ones proper to have been adjucitated in the Pennsylvania litigation (R 783). The Court held that respondent could not have charged her husband with desertion in the Pennsylvania action because the desertion

had not existed for two years or more (R 783). The Court stated that the facts relied upon by the respondent in her Pennsylvania suit in which she sought an absolute divorce on the ground of indignities to her person would have been essentially the same had she appeared and testified, as the facts which she presented in the Florida action (R 784). Petitioner contended that since the facts were essentially the same, the final decree of the Pennsylvania Court was res judicata and therefore a bar to the granting of a divorce by the Florida Courts. Notwithstanding that the facts were essentially the same as respondent would have been compelled to prove in the Pennsylvania action, the Supreme Court of Florida held that the final judgment of the Pennsylvania Court did not operate as res adjudicata upon the final decree of divorce granted upon the ground of desertion because the points and questions actually litigated and determined were not the same in both actions (R 787). To arrive at that conclusion, the Florida Court adopted the following reasoning: While it is true that the facts relied upon by respondent in her Pennsylvania suit on the ground of indignities to the person would have been essentially the same as the facts she presented in the Florida action, the degree of proof necessary to entitle her to a final decree of divorce upon the ground of indignities to the person in the Pennsylvania action was greater than the degree of proof required to establish that she was justified in temporarily separating from her husband under the law of the State of Florida, and that therefore, neither estoppel by judgment nor res adjudicata forms a basis for invocation of the full faith and credit clause of the Federal Constitution (R 784).

The final decree of the Supreme Court of Florida granting respondent a divorce upon the ground of desertion is thus based upon the action of the Florida Court in construing the effect of the final judgment of the Pennsylvania Court insofar as the Supreme Court of Florida based its opinion upon the degree of proof required in Pennsylvania,

to entitle a litigant to a final decree of divorce upon the ground of indignities to the person.

The Florida Court had knowledge of the degree of proof required under the laws of the State of Florida to justify a wife in temporarily separating from her husband and thus to begin the period of "constructive" desertion. The Supreme Court of Florida failed to give full faith and credit to the final judgment of the Pennsylvania Court when it attempted to define the degree of proof required in Pennsylvania to entitle a litigant to a final decree of divorce upon the ground of indignities to the person. The law of Pennsylvania was in evidence upon the trial; there was no contradiction of it; and it showed that there is no general rule under the law of Pennsylvania as to the degree of proof required to sustain a decree of divorce upon the ground of indignities to the person. (R456)

The fact that there is no general rule in Pennsylvania regarding the matter is sustained by many decisions of the Superior Court of Pennsylvania, copies of opinions in which were in evidence in this case. The numerous decisions of the Superior Court of Pennsylvania sustain the proposition as stated in the opinion of the Superior Court of Pennsylvania, in the case of BOCK V. BOCK, reported in 162 Pa. Superior Ct. at page 506, from which we quote as follows (R 456): "As stated by Judge Rhodes in Monaco V. Monaco, 160 Pa. Superior Ct. 117, at page 118, 50 A. 2d 520, at page 521: "We have repeatedly said that it is impossible to lay down a general rule for the determination of what indignities render the condition of the injured party intolerable and his life burdensome. Hahn v. Hahn, 135 Pa. Superior Ct. 39, 41, 4 A. 2d 821. The circumstances of each case must largely determine whether the acts charged amount to such indignities as will justify the court in making a decree of divorce. * * * "

Similar statements in other opinions are contained in the record at pages 336, 384, 391, 424, 431, and 465.

In the Florida action petitioner raised the question of residence and domicile of the respondent, denying in his answer that respondent had been a resident of Florida for for more than 90 days prior to the filing of her bill of complaint. He averred on the contrary, that her bona fide legal residence on June 28, 1947, and prior thereto, was in Pennsylvania (R 89). He denied that he was guilty of desertion and everred on the contrary that respondent had deserted him in Pennsylvania (R 105).

The master in the Pennsylvania case had considered the question of residence and domicile and on the basis of the facts presented, found that the respondent was domiciled in Pennsylvania and not domiciled in the State of Florida on May 27, 1947, the date of the hearing in Pennsylvania (R 222, 218). On June 28, 1947, the findings of fact, conclusions of law, and recommendation of the master were adopted by the Pennsylvania Court and the libel was dismissed at her costs (R 230). Respondent had filed her action in the Florida case on September 30, 1946 (R 8).

The respondent voluntarily selected the Pennsylvania Court as the Court to try her action for divorce from her husband by filing a libel in the Pennsylvania Court on January 18, 1946 (R 8). She actively participated in the action in that Court when on May 5, 1947, she filed her petition for leave to discontinue her action, which leave was not granted (R 8-9). She was given ample notice and opportunity to be heard in the Pennsylvania action (R 13).

The petitioner had constantly raised the question of the residence of respondent in the case before the Circuit Court for Dade County, Florida, and also upon appeal to the Su-

preme Court of Florida[1], (See Note). The question as to whether the respondent was in fact a resident of Pennsylvania or a resident of Florida at the time she filed her action in Flordia and for 90 days prior thereto was not discussed by the Supreme Court of Florida in its opinion which was filed on May 2, 1952 (R 770).

Under the rules of practice in the Supreme Court of Florida, petitioner, within fifteen days after the filing of said opinion, petitioned the Supreme Court of Florida for rehearing, raising the questions now presented upon this petition, and specifically raising the question of residence of respondent (R 799, 800), and the fact that the conduct of the husband insofar as it would justify his wife in leaving him had been finally adjudicated by the final decree of the Pennsylvania Court (R 798).

The Supreme Court of Florida denied the petition for rehearing on the 21st day of May, 1952. (R 803).

NOTE 1:

That question was raised as follows:

In petitioner's objections to respondent's motion for leave to file amended Bill of Complaint (R 41).

In petitioner's motion to strike parts of respondent's response (R 43-46).

In petitioner's motion to strike parts of Amended Bill of Complaint (R 70).

In petitioner's motion to dismiss Amended Bill of Complaint (R 82).

In petitioner's answer to Amended Bill of Complaint (R 89).

In petitioner's contention before the Special Master (R 486).

In the 11th Exception to the Report of the Special Master (R 506).

In the 8th Assignment of Error (R 549).

JURISDICTION

1. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, which provides, in part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: • • • • •

"(3) By writ of certiorari, •••• where any title, right, privilege or immunity is specially set up or claimed under the Constitution, • • • •"

2. It is contended that the Supreme Court of the State of Florida did not give to the final judgment of a Pennsylvania Court of record, the full faith and credit to which the judgment of the Pennsylvania Court was entitled under the full faith and credit clause of the Federal Constitution, and therefore it is believed that the following cases sustain the jurisdiction of this Court:

Titus v. Wallick, 306 U. S. 282, 83 L. Ed. 653.

Supreme Council of Royal Arcanum v. Green, 237 U. S. 531, 59 L. Ed. 1089.

Sutton v. Leib, 342 U. S. 402, 72 S. Ct. 398, and cases therein cited including those cited in the notes stated in the report of that case.

3. The Supreme Court of Florida is the highest court of the State.

4. The judgment of which review is sought is a final judgment of the Supreme Court of Florida (R 789).

5. The judgment herein sought to be reviewed was filed on May 2, 1952 (R 788).

The Supreme Court of Florida denied a petition for rehearing in said case on the 21st day of May, 1952 (R 803).

6. The federal question of substance which has been decided by the Supreme Court of Florida is that, while the final decision of the Pennsylvania Court is entitled to full faith and credit under the Constitution and laws of the United States, that Pennsylvania judgment entered in an action instituted in Pennsylvania by the respondent, before she instituted her action in the sister state of Florida, was not res adjudicata in the subsequent divorce action in Florida, even though the parties were identical and the wife had instituted the action in each court, and thereby, voluntarily appeared in the Pennsylvania Court, and also in the Florida Court.

The decision of the Supreme Court of Florida denies to the final judgment of the Pennsylvania Court the full faith and credit guaranteed by the Constitution of the United States. The Supreme Court of Florida recognizes the fact that full faith and credit must be accorded judgments of a court of a sister state. In the first appeal the Court enforced the correct rule as to the requirements of the full faith and credit clause of the Federal Constitution. Upon the second appeal, the Court enforced that rule, but in part only. Therefore, it did not give to the final judgment of the Pennsylvania Court the full faith and credit guaranteed by the Constitution of the United States.

The decision of the Supreme Court of Florida is in conflict with the decisions of this court relative to the full faith and credit clause of the Federal Constitution and particularly is it in conflict with the recent decision of this Court in the case of Sutton v. Leib, No. 143 October term, 1951, reported in 342 U. S. 402; 72 S. Ct. 98, wherein this court held that a state court must give the same force and effect to the decrees of a court of a sister state as is accorded those decrees by the court in the state where rendered.

It is contended that the decree of the Supreme Court of Florida is in conflict with the recent decisions of this Court with respect to the effect to be given a final judgment of a state court under the full faith and credit clause in actions for divorce.

7. This petition for certiorari is filed in accordance with the United States Code Title 28, Section 2101, which provides, inter alia, as follows:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. • • • • •

"The running of the time within which proceedings may be initiated here to bring up judgment or decrees for review is suspended by the seasonable filing of a petition for rehearing." Gypsy Oil Company v. Escol, 275 U. S. 498, 72 L. Ed. 393.

It begins to run from the date of denial of such petition.

The petition for rehearing was denied May 21, 1952 (R 803).

8. The Federal questions raised in this case were raised by the petitioner, who continued to raise those questions throughout the trial in the Florida case.

QUESTIONS PRESENTED

1. Where wife files applicaion for divorce in Pennsylvania Court on the ground of indignities to her person, and after full hearing, at which wife had ample opportunity to be heard but did not attend, Pennsylvania Court enters

a final decree holding that wife had failed to support her claim and therefore, her action was dismissed at her cost, is that final judgment of the Pennsylvania Court res adjudicata in a divorce action filed in Florida after the Pennsylvania action had been filed, when the facts as to the conduct of the husband are substantially the same as the wife would have been required to prove in Pennsylvania to sustain her action for divorce?

2. In such case, where the Pennsylvania Court found, after hearing and upon competent testimony, that the wife was a resident of Pennsylvania and was not domiciled in Florida when her Florida action was filed, is that finding of the Pennsylvania Court conclusive in the subsequent action for divorce in Florida, under the full faith and credit clause of the Constitution of the United States?

3. Where the character of testimony relied upon by a wife to justify her in leaving her husband under the laws of Florida is substantially the same as that required to establish her charge of indignities to her person in a Pennsylvania Court, may the Florida Court retry the issues as to the conduct of her husband, and grant the wife a divorce on the ground of constructive desertion in an action instituted in Florida, after the wife's prior divorce action in Pennsylvania on the charge of indignities to the person has been dismissed for lack of the proof required to maintain her action in Pennsylvania?

4. Is a final judgment of a Pennsylvania Court, denying a wife a divorce on the ground of indignities to the person, conclusive as to all questions of fact essential to and litigated in the Pennsylvania Court, so that the wife is barred from obtaining a divorce in a subsequent action in Florida upon the ground of constructive desertion, based upon the same conduct of the husband as was adjudicated in the Pennsylvania action?

5. Where wife applies for divorce upon the ground of indignities to the person in a Pennsylvania Court, and that Court dismisses her action for failure of proof, and there is no general rule as to the degree of proof required to sustain an action for divorce on the ground of indignities to the person under Pennsylvania law, may the Florida Court subsequently grant a divorce to the wife on the ground of constructive desertion, where the conduct of the husband relied upon as the cause for the wife leaving her husband, is the same conduct as was passed upon in the Pennsylvania case?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of Florida has decided important questions arising under the Constitution of the United States of America and involving full faith and credit. It is contended that is has decided those questions in a way probably untenable and in conflict with the applicable decisions of this Court in the cases decided by this Court with respect to the full faith and credit which must be accorded a final judgment of a State court by courts of sister states in cases involving the granting of a divorce.

The cases referred to are COOK V. COOK, 342 U. S. 126; 72 S. Ct. 157, and SUTTON V. LEIB, 342 U. S. 402; 72 S. Ct. 398, together with other cases therein referred to and particularly in the notations appearing in the report of the last mentioned case. Reference is made also to the report of the case of GORDON V. GORDON, 160 Fla. 838, 36 So. 2d 774, as reported in 4 A.L.R. 2d 102, with annotations in the same volume beginning at page 107.

There are many decisions of your Honorable Court holding that where a state court grants a decree of divorce which compiles with all the laws of the state court granting the decree, that decree in divorce must be given the same full faith and credit in divorce must be given the same full faith and credit in every other state as it is entitled to in the state in which it is granted. Diligent search has disclosed no reported case decided by your Honorable Court setting forth the rule which must apply to the Courts of all States where a final judgment of a state court is entered denying a divorce application. For the sake of uniformity throughout the United States, the writ of certiorari should be allowed in this case so that a definite rule may be announced by your Honorable Court with relation to the full faith and credit which must be accorded a final judgment of a state court denying a divorce.

This case involves questions of great public importance involving martial status ,and the full faith and credit clause, where judgments of two state courts are involved. These matters of family status, marriage and divorce are of the greatest importance. We believe that there is no prior decision of this Court stating specifically that where a state court has entered a final judgment denying a divorce in a case complying with all the laws of that state, that final judgment denying the divorce, is entitled to the same full faith and credit in every other state as it is entitled to in the state denying the divorce.

It is contended that the Florida Courts have decided a federal question of substance in a manner not in accord with applicable decisions of Your Honorable Court. The grounds upon which the writ of certiorari is sought are substantial, because there may be many cases involving the marital relationship of many persons, in which full faith and credit may be denied a final judgment of a state court, by courts of other states relying upon the judgment of the Supreme Court of Florida in this case. The question as to whether one state has, or has not, accorded to the final

judgment of the courts of a sister state the full faith and credit guaranteed by the Constitution, and laws of the United States, and the judical decisions of Your Honorable Court, is also substantial because it involves constitutional rights.

Your Honorable Court has held that full faith and credit must be given to divorce decrees rendered in contested cases by courts in sister states, even though doing so may conflict with local policy, because that is part of the price we pay for our constitutional guarantees.

The questions presented in this case are substantial because they seriously affect the parties and their constitutional rights. Under the final judgment of the Pennsylvania Court the marital status of the parties hereto was not changed. Under the decree of the Florida Courts, the parties are no longer man and wife. Under the final judgment of the Pennsylvania Court, the respondent was a resident of Pennsylvania from 1941 until May 27, 1947. Under the decree of the Florida Courts, the respondent was a resident of Florida for at least 90 days before September 30, 1946. Those inconsistent judgments detrimentally affect the constitutional rights of the parties to this case.

The federal purpose of the full faith and credit clause of our constitution makes Your Honorable Court, for both state and federal courts, the final authority when a question is raised as to what is the permissible limit of the full faith and credit clause, and therefore, petitioner's constitutional rights should not be denied him by a decree of a state court defining the permissible limits of that clause.

The denial to petitioner of his constitutional rights to avoid relitigation of matters finally determined by one state court constitutes a substantial reason to allow a writ of certiorari in this case. Your Honorable Court has held that where a state court has determined the question of residence between parties, any attempt of a sister state to

redetermine that question of residence is void, and full faith and credit should be accorded the state which first determined that question of residence.

We respectfully represent that the Supreme Court of Florida has failed to give to the final judgment of the Pennsylvania Court, denying a divorce to the wife, the full faith and credit which should be accorded to that Pennsylvania decree. Since there is no prior decision of this Court relative to the full faith and credit which must be given in all the states to a final decree of a state court denying a divorce, the petition for certiorari should be granted so that a uniform rule may be obtained with reference to such final judgments of state courts denying divorce applications, as distinguished from those where the state courts have granted divorces.

We believe that a decree of this Court in the instant case will remove the lack of uniformity relative to the full faith and credit which must be given the final judgments of state courts in divorce actions. That there is a lack of uniformity with respect to the questions presented in the instant case is clearly shown by the opinion of the Supreme Court of Florida, from which we quote as follows (R 773): "Apparently some lawyers and text book authors believe there is confusion in the law of this jurisdiction upon the question, under what circumstances does the doctrine of res adjudicata or the principal of estoppel by judgment become operative. In all probability the confusion which apparently exists stems from a failure clearly to comprehend the difference between the doctrine of res adjudicata and estoppel by judgment and to understand the (R 774) test proper to be applied in determining which, or whether either, may be appropriately invoked. Estoppel by judgment has its counterparts or at least its quasi counterparts, in "estoppel by verdict" and "conclusiveness of verdict." Either res adjudicata or estoppel by judgment furnishes the primary test in determining the applicability of the full

faith and credit clause of the Federal Constitution. This Court has at least indicated that full faith and credit need not be given to a final decree of a sister state when estoppel by judgment is the appropriate test unless the "precise facts" offered by the plaintiff in the Florida action were heard and determined in the former suit which was adjudicated in the foreign jurisdiction. See Bagwell v. Bagwell, 153 Fla. 471, 14 So. 2d 841.

The adjudications in other jurisdictions which we have considered in connection with this case lead us to the conclusion that there is an absence of uniformity with respect to the test which should be employed to determine whether a final decree or judgment of a foreign jurisdiction should be accorded full faith and credit in a subsequent action be between the same parties.* Some courts hold, so we believe, as we held in Gordon v. Gordon, supra, that is to say that the determining factor in deciding whether the cause of action asserted in the first suit was the same as that relied upon in the second suit, is whether the evidence necessary to sustain the latter action was essentially the same as that which was given or would have been required had the complaining party testified in the prior suit. Buder v. Fiske, 174 F. 2d 260; Griggs v. Griggs, 214 S. C. 177, 51 S. E. 2d 622; Whelan v Connolly, 80 N. Y. S. 2d 691; Band v. Reinke, 230 Iowa 515, 298 N. W. 865; Jackson v. Pepper Gasoline Co., 284 Ky. 175, 144 S. W. 2d 212. See also 4 A.L.R. 2d 107 et seq. Other courts are of the opinion that full faith and credit should be given and that a final decree of a court of competent jurisdiction of a sister state should operate as a bar to a subsequent action as to all matters which were or (R 775) might have been litigated orginally. Ashton v. Ashton, 192 Ark. 774, 94 S. W. 2d 1033; Bowen v. Bowen, 219 Iowa 550, 258 N. W. 882; Ball v. Ball, 189 Ark. 975, 76 S. W. 2d 71; 27 C.J.S., Divorce, Sec. 326, page 1271; 4 A.L.R. 2d 114.

* Blackface supplied.

We have held as a general proposition that when a final decree or judgment of a court of competent jurisdiction becomes absolute it puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated, issue. This pronouncement is considered by us as controlling only when res adjudicata is the proper test. By this we mean it is not controlling except in an instance wherein the second suit is between the same parties and is predicated upon the same cause of action as was the first. If the second suit is bottomed upon a different cause of action than that alleged in the prior case estoppel by judgment comes into play and only those matters actually litigated and determined in the initial action are forclosed—not other matters which "might have been but were not litigated or decided." Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L.R.A. (N.S.) 577; Bagwell v. Bagwell, supra. The test proper to be applied in a divorce action in order to decide whether the second suit is founded upon a new and separate cause of action is not simple whether a different statutory ground for divorce is asserted but whether the facts necessary to the maintenance of such suit are essentially the same as those which were relied upon to establish plaintiff's alleged right to a decree in the first action and whether the decree or judgment sought in each required the same degree of proof to justify or sustain it. If the degree of proof required in the first suit is greater than that required in the second the cause of action cannot be held to be the same and estoppel by judgment is the proper test to be applied.

(R 776) A great many courts and text book writers treat "res adjudicata" and "estoppel by judgment" as synonymous. The most erudite legal minds appear to have difficulty in stating the difference which they consider exists between them. We find no occasion to discuss the slight difference which some authors limn between the terms "estoppel by judgment", "estoppel by verdict" or "conclusiveness of verdict". These expressions are oft times used interchangeably. Although dissertations have come to our attention in which the doctrine of res adjudicata is considered as a sub-division or branch of the law of estop-

pel, strictly and technically speaking, such treatment is not proper. The former is founded upon the sound proposition that there should be an end to litigation and that in the interest of the State every justiciable controversy should be settled in one action in order that the courts and the parties will not be pothered for the same cause by interminable litigation. On the other hand, estoppel rests upon equitable principles. 50 C.J.S., Judgments, Sec. 593. Even so, the ultimate purpose of estoppel by judgment is to bring litigation to an end. The difference which we consider exists between res adjudicata and estoppel by judgment is that under res adjudicata a final decree or judgment bars a subsequent suit between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised, while the principle of estoppel by judgment is applicable where the two causes of action are different, in which case the judgment in the first suit only estops the parties from litigating in the second suit issues—that is to say points and questions—common to both causes of action and which were actually adjudicated in the prior litigation." (R 776).

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment and decree of the Supreme Court of Florida filed in this proceeding on May 2, 1952 should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

I.

OPINION OF THE COURT BELOW

This case was in the Supreme Court of Florida twice. The citation of the opinion of the Supreme Court of Florida on the first appeal is 160 Fla. 838, 36 So. 2d 774, ~~3d 102~~. The opinion appears in the record in this case, pages ~~7~~ 8 to ~~5~~ 13 inclusive.

The opinion of the Court sought to be reviewed was filed May 2, 1952, and is reported in 59 So. 2d, at page 40. The opinion appears in the record in this case, pages 770 to 787 inclusive.

II.

STATEMENT OF FACTS

We respectfully submit that the facts to be considered in this case are set forth fully in the petition under the heading of "Summary Statement of the Facts". (Petition, page 1 et. seq.)

III.

ASSIGNMENTS OF ERROR

1. The Supreme Court of Florida erred in failing to give full faith and credit to the final decree of the Pennsylvania Court by which the Pennsylvania Court had found that respondent was a resident of Pennsylvania and that she was not domiciled in Florida when her Florida action was filed.

2. The Supreme Court of Florida erred in failing to give full faith and credit to the final decree of the Pennsylvania Court by granting respondent a divorce on the ground of constructive desertion when the character of the testimony relied upon to justify respondent in leaving her husband was essentially the same as she would have been required to present in the Pennsylvania Court to establish her charge of indignities to the person.

3. The Supreme Court of Florida erred in failing to hold that the final judgment of the Pennsylvania Court, by which a divorce was denied, was res judicata in the action for divorce between the same parties in the Florida Courts.

4. The Florida Court erred in holding that the degree of proof required under the laws of the State of Florida to justify a wife in temporary leaving her husband was less than the degree of proof required to sustain a divorce on the ground of indignities to the person under the Pennsylvania law because there is no general rule in Pennsylvania as to the degree of proof required in such case.

5. The Supreme Court of Florida erred in failing to hold that the final judgment of the Pennsylvania Court, being entitled to full faith and credit, was conclusive as to all questions of fact essential to and litigated in the Pennsylvania action, and in failing to hold that the final judgment of that Court conclusively established the fact that petitioner's conduct was not such as to justify respondent in leaving him, but that respondent had, in fact, deserted petitioner.

6. The Florida Court erred in failing to give to the final judgment of the Pennsylvania Court the full faith and credit to which it was entitled in Pennsylvania, as required by the Constitution and laws of the United States and the judical decisions of Your Honorable Court.

IV.

PROPOSITIONS OF LAW

Petitioner contends that all factual issues as to domicile and residence of the respondent and the petitioner, and all other matters bearing upon jurisdiction, must be considered as forclosed by the final decree of the Pennsylvania Court since both parties to the divorce appeared in that Court and thereby became subject to its final decree. In support of this proposition, we cite: WILLIAMS V. NORTH CAROLINA, 325, U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577; SHERRER V. SHERRER, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429; COOK V. COOK, 342, U. S. 126, 72 S. Ct. 157 SUTTON V. LEIB, 342 U. S. 402, 72 S. Ct. 398.

Petitioner respectfully submits that under the decisions of Your Honorable Court, the full faith and credit clause of the Federal Constitution demands that the courts of each state give to a final decree of another state full faith and credit by barring either party to a divorce acion, who has been personally served, or who has entered a personal appearance, from collaterally attacking the decree of the court, in a state other than that in which it was entered. We believe that this proposition is sustained by the decisions of Your Honorable Court above mentioned, and also in the SECOND WILLIAMS CASE, 325 U. S. 226, S. Ct. 1092, at 1095, 89 L. Ed. 1577, and in the case of JOHNSON V. MULLBERGER, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

The propositions relied upon by the petitioner are:

1. A final decree of divorce, granted by a state court, where the parties have appeared, is entitled to full faith and credit in every state of the Union. Likewise, we contend that a final decree of a state court, denying a wife a divorce, is entitled to full faith and credit in every state of the

Union, and is conclusive upon all parties who appeared, as to the questions of domicile, good faith and conduct litigated in the action wherein the divorce was refused. In this case, the wife herself selected the Pennsylvania Court for the trial of the Pennsylvania action and therefore she was bound by the final decree of that Court.

2. There is no general rule as to the degree of proof required to sustain a divorce in Pennsylvania upon the ground of indignities to the person. Therefore the Supreme Court of Florida could not legally assume that there was a general rule in Pennsylvania, setting forth the degree of proof required in that state, and thus compare that rule with a rule in Florida justifying a wife in leaving her husband. The decision of the Supreme Court of Florida is based upon the assumption that the Florida courts demand less proof of mis-conduct to justify a wife in leaving her husband than do the Pennsylvania Courts to justify a wife in obtaining a divorce on the ground of indignities to the person. Since there is no rule in Pennsylvania by which the degree of proof could be measured, the reason given by the Supreme Court of Florida for its decree is not sound and, therefore, the proceeding in the Supreme Court of Florida should be reviewed by your Honorable Court and its final decree reversed.

3. To permit the decree of the Supreme Court of Florida to stand, results in a situation which should not be permitted. Under the final decree of the Pennsylvania Court, the marital status of these parties was not changed. The wife failed to sustain the burden of proving that her husband's conduct entitled her to a divorce on the grounds of indignities to her person. In that Court the proof was that the conduct of the husband could not have caused the wife to leave the husband, but on the contrary, it was shown that the wife deserted the husband. Under the final decree in the Florida case the same conduct was held to justify the wife in leaving her husband, and it was held

the wife had not deserted her husband, but on the contrary, the husband was guilty of constructive desertion of his wife.

4. Under the final judgment of the Pennsylvania Court it was determined that the wife, who was the plaintiff in the action, was a resident of, and domiciled in Pennsylvania from 1941 until 1947, and that she was not domiciled in Florida during any of that time. If that decision is given full faith and credit, then the wife could not possibly have been a resident of Florida for 90 days before she filed her action in the Florida Court on September 30, 1946.

V.

CONCLUSION

We respectfully submit that this case presents substantial and serious legal questions involving the final decrees of two states of the United States, which decrees are inconsistent. We contend further that the decree of the Supreme Court of Florida has denied to the final judgment of the Pennsylvania Court the full faith and credit demanded by the Constitution of the United States.

We believe that the propositions stated are supported by many decisions of your Honorable Court, many of which are set forth in the opinion, and in the notes of the report of the opinion, of your Honorable Court in the case of SUTTON V. LEIB, 342 U. S. 402, 72 S. Ct. 398. Also in those decisions set forth in the Annotations of the instant case as it first appeared in the Supreme Court of Florida, as set forth in 4 A.L.R. 2d at page 102 and 107 et seq.

Wherefore, we respectfully pray your Honorable Court to grant a writ of certiorari so that the judgment of the Supreme Court of Florida may be reviewed.

Respectfully submitted,

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